In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 758

UNITED STATES OF AMERICA, PETITIONER

v.

RAYMOND J. RYAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

While recognizing the validity of the finality rule of *Cobbledick* v. *United States,* 309 U.S. 323—as indeed he must in light of its repeated reaffirmance by this Court and the lower federal courts—respondent weakens the vitality of that rule by arguing its inapplicability to this case.

A. Respondent urges (Res. Br. 21–37) that the order of the district court imposed affirmative obligations beyond those permissible under a subpoena *duces tecum* and that accordingly the order was a mandatory injunction having an appealable life of its own under 28 U.S.C. 1292(a)(1).

1. A fair construction of the original subpoena (A. 11–12) obviously carried with it an implicit directive that all reasonable efforts be taken to comply with its

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terms. "A subpoena has never been treated as an invitation to a game of hare and hounds, in which the witness must testify only if discovered at the end of the chase." *United States* v. *Bryan*, 339 U.S. 323, 331. Respondent did not seek to comply, but instead moved to quash, alleging, *inter alia*, that he could not fully comply as to certain records because of the restrictions of Kenya law. Following proceedings over several months, the district court found that respondent had control over the records and directed that he request Kenya authorities to release certain of these records and if that request be denied to make these records available for inspection and copying in Kenya (A. 63–64). It is beside the point whether the subpoena itself could have contained these modifying conditions since the subpoena was enforceable by the court and clearly subject to modification by it. Compare Rule 17(c), F. R. Cr. P.; *Bowman Dairy Co.* v. *United States*, 341 U.S. 214, 220–221. Notwithstanding respondent's contrary claim, the court acted within its power and did ease the burden of the original subpoena.[1]

The cases cited (Res. Br. 23, 34–35) for the proposition that the modifying order was beyond the

[1] Despite respondent's repeated exception to our view that the court's order eased the burden of compliance (Res. Br. 24–26), it did just that. Respondent could have been held in contempt had the district court without more simply denied his motion to quash. Even if erroneous, that denial would not have been appealable; appellate review would necessarily have had to await a finding of contempt. See *Will* v. *United States*, 389 U.S. 90, 98 n. 6. By issuing the order which specifically afforded reasonable modes of compliance as to the restricted records, the district court in a very real sense removed this dilemma and eased the burden of compliance.

court's power are wide of the mark. *Application of Chase Manhattan Bank*, 192 F. Supp. 817 (S.D.N.Y.), simply recognizes that a court should take account of foreign law by modifying a subpoena *duces tecum*; indeed it cites as authority *Securities and Exchange Commission* v. *Minas de Artemisa*, 150 F. 2d 215, 218–219 (C.A. 9), where the court had restructured a subpoena *duces tecum* to comply with foreign law (see our discussion in our opening brief, pp. 18–19, n. 13).

Nor do cases like *Amey* v. *Long*, 9 East 473, 103 Eng. Rep. 653 (K.B. 1808), or *Munroe* v. *United States*, 216 Fed. 107 (C.A. 1), aid respondent.[2] In essence, they hold that a person who is directed to produce papers assertedly in his possession and control which are, in fact, in the possession and control of others may not be held in contempt for failure to produce. They do not suggest that he may not be required to take reasonable steps and make good faith efforts to produce records in his actual or constructive possession; and they do not focus upon the question of appealability. Respondent was not required to produce papers in the possession of others; he was simply required to ask Kenya authorities to allow him to produce certain documents which the court found were

[2] *Amey* v. *Long*, involved a subpoena at a trial, 9 East 473–474; while *Munroe* involved a grand jury subpoena, and was decided in 1914 at a time when there may have been a question (as the opinion itself indicates, 216 Fed. at 112–113) whether an individual within the court's jurisdiction could be required to travel outside the district of his own residence much less to a foreign country to obtain documents. *Munroe* was decided twelve years before Congress enacted the precursor to present 28 U.S.C. 1783. See *United States* v. *Thompson*, 319 F. 2d 665, 668–669 (C.A. 2).

under his control in that country or, if that effort failed, to permit inspection by agents of the grand jury in Kenya.[3] Respondent should not be heard to equate the reasonable directives in this case with one that would require a witness "to sue and labour in order to obtain the possession of any instrument from another for the purpose of its production afterwards by himself, in obedience to the subpoena." *Amey* v. *Long, supra,* at 483, 103 Eng. Rep. at 657.[4]

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[3] Respondent misconceives the import of the order by contending that the second alternative made records available to Internal Revenue Agents "without the slightest safeguard that they would not be used in a thoroughly impermissible way to initiate or sustain civil tax assessments" (Res. Br. 29). Read in its entirety, the thrust of the order was that the government agents who were to be permitted to examine the records were agents of the grand jury and could not disclose the information to any other body or use it for any other purpose without a subsequent order of the court. If respondent had any doubt on that score he could have requested the court to make this implicit directive explicit. There is nothing to show that the grand jury was doing anything more than seeking the documents in accord with its broad-ranging investigative authority. See *e.g.*, Douglas, J., dissenting in *Hannah* v. *Larche*, 363 U.S. 420, 497–499, for a summary of the broad role of the grand jury in the American system of justice.

[4] Respondent is thus not on sound ground in his reference to a witness' obligations under a subpoena regarding papers in the custody of a "State Court" or in possession of a person who "has an adverse claim" to them (Res. Br. 27) or of a "close friend" who had custody or control (Res. Br. 33–34). The challenged portion of the order here in issue did not compel respondent to bring a law suit against any one or attempt to "persuade" another who had "custody and control" (Res. Br. 34) to give them up. It simply required that he "make application" to appropriate Kenya authorities and if "unable to secure the consent of such authorities for the removal of certain of the documents in his control to make these available for inspection in Kenya (A. 64).

2. The cases relied upon by respondent in contending that the order was appealable under 28 U.S.C. 1292(a)(1) are not persuasive. He makes no mention of the leading decisions of this Court which have interpreted the interlocutory remedy of Section 1292(a)(1) quite narrowly. See, *e.g.*, *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U.S. 176, 180–182, and *Switzerland Cheese Association, Inc.* v. *Horne's Market*, 385 U.S. 23, discussed in our opening brief at pp. 21–22. Instead, he relies upon cases whose relevance is at best remote and tenuous (Res. Br. 26).

B. Respondent further asserts that the order would have been appealable had the district court done nothing more than deny the motion to quash. This seems a surprising assertion in light of respondent's insistence that *Cobbledick* is still good law. At all events this claim is without merit.

1. To the extent that respondent appears to be urging (Res. Br. 39–41) that a subpoena *duces tecum* may not be addressed to an individual to obtain corporate records under his control in a foreign country, that contention finds no support in the present-day cases of this Court. (See our opening brief, p. 18 n. 12.)[8] Nor do we, in any event, perceive the relevance of that contention to the issue of appealability.

[8] At the same time, respondent argues (Res. Br. 35–36) that the government should have requested issuance of a subpoena under 28 U.S.C. 1783(a). But that section authorized the issuance of a subpoena to "a national or resident of the United States *who is in a foreign country* * * *" [emphasis added]. Since respondent was in this country when the subpoena was issued, that provision by its express terms is inapplicable here. Cf. Rule 17(e), F.R. Cr. P.

Insofar as respondent is contending (Res. Br. 36–37, 39) that the delay and cost inherent in requiring one to travel overseas to obtain a substantial volume of documents takes the case outside of the *Cobbledick* rule, he is overlooking the facts of this record and urging a distinction not subject to orderly and foreseeable application. The cost and delay argument has little force in the light of respondent's rejection of the trial judge's offer to relieve him of the obligation to bring *any* records from Kenya by incorporating in his order the government's suggestion that respondent permit copying there (A. 52–62, 64; 1 R. 65–66). Even putting this to one side, compliance with any order to produce contains an inherent element of delay—whether a federal grand jury sitting in Los Angeles seeks documents which are in Kenya or, for that matter, in New York. To adopt volume or location as the test would deny any certainty to the *Cobbledick* rule.

2. The cases relied upon by respondent where appeal has been allowed as exceptions to *Cobbledick* are unconvincing. Most have nothing to do with grand juries and others fall under long-standing exceptions which we recognized in our opening brief, pp. 25–26 n. 20.[6]

[6] For example, *First National City Bank of New York* v. *Aristeguieta*, 287 F. 2d 219 (C.A. 2), involved a district court order in an extradition case granting Venezuela's motion that certain banks produce records deemed relevant to the extradition proceedings. In holding the order appealable, the Second Circuit distinguished *Cobbledick* on familiar and long accepted grounds—*i.e.*, that if review was not then allowed, the bank's contentions would never be subject to review and that extradition is a

A further word is in order regarding respondent's reliance upon *Perlman* v. *United States*, 247 U.S. 7, and *Schwimmer* v. *United States*, 232 F. 2d 855 (C.A. 8). *Perlman* involved documents first produced in a civil suit which had been concluded with the condition that the documents should remain impounded in the custody of the Clerk and the evidence should be perpetuated for use in future cases between the parties and their privies (see 247 U.S. at 9). When the United States sought to have the exhibits released to a grand jury to consider whether Perlman had committed perjury, Perlman, claiming ownership of the property, sought to have such use barred on self-incrimination grounds. The rationale of the Court's decision that the order denying his motion was appealable—as interpreted in *Cobbledick, supra*, 309 U.S. at 328–329—was that to "have denied him opportunity for review on the theory that the district court's order was interlocutory would have made the doctrine of finality a means of denying Perlman any appellate review of his constitutional claim." *Schwimmer, supra*, was of the same cast. There the books

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unique and self-contained proceeding analogous to proceedings before administrative agencies. See 287 F. 2d at 222–223. This latter distinction was reaffirmed in *In re Letters Rogatory, etc.*, 385 F. 2d 1017, 1018 (C.A. 2), in reliance upon *Aristeguieta*.

The other cases cited by respondent—*e.g.*, *Saunders* v. *Great Western Sugar Co.*, 396 F. 2d 794 (C.A. 10); *Covey Oil Co.* v. *Continental Oil Co.*, 340 F. 2d 993 (C.A. 10); *In re Wingreen Co.*, 412 F. 2d 1048 (C.A. 5); *McDonnell* v. *Birrell*, 321 F. 2d 946 (C.A. 2); *Mosseller* v. *United States*, 158 F. 2d 380 (C.A. 2)—are equally far afield or consistent with prevailing rules, and have nothing to do with this case.

were in the custody of a company which had produced them pursuant to subpoena, when Schwimmer, the alleged owner, moved to preclude their submission to the grand jury. To the extent that these decisions, and the similiar decision in *United States* v. *Guterma*, 272 F. 2d 344 (C.A. 2), have vitality in light of this Court's subsequent decision in *DiBella* v. *United States*, 369 U.S. 121,[7] they are readily distinguishable from the case at hand. For here if respondent is found in contempt, he will still have an opportunity to litigate on appeal the validity of the original order before the grand jury would see the records.

[7] Doubt as to the present-day validity of *Perlman* not only is suggested in the opinion in *DiBella* itself, *supra*, 369 U.S. at 124, but appears from other sources. See, *e.g.*, *In re Grand Jury Investigation of Violations*, 318 F. 2d 533, 538 (C.A. 2), petition for certiorari dismissed, 375 U.S. 802.

Professor Moore has taken the view that *Perlman* and the cases which rely upon it (like *Schwimmer*, *supra*) are wrong and have not survived *DiBella*. As he points out "Perlman, if he had been indicted would have been entitled to object to any use of the papers at his trial and, if convicted, would have been entitled to appellate review of any ruling with respect to their use. In any event, *Perlman* would appear not to have survived more recent decisions of the Supreme Court, most notably, *DiBella* * * * that stress the high undesirability of interlocutory appeals in criminal cases." 9 Moore's *Federal Practice* (1970 ed.) ¶ 110.13[11], pp. 192–193. The other recent decisions would include, *e.g.*, *United States* v. *Blue*, 384 U.S. 251, *Costello* v. *United States*, 350 U.S. 359, and *Lawn* v. *United States*, 355 U.S. 339, holding that defendants have no complaint as to evidence used before a grand jury even if allegedly obtained in an unconstitutional manner.

3. In sum, we agree that *Cobbledick* is not an inflexible rule and is subject to exception in appropriate circumstances. We urge, however, that nothing in this case justifies an application of such an exception; that, in a word, to hold *Cobbledick* inapplicable to the present case is effectively to disregard that decision.

Respectfully submitted.

ERWIN N. GRISWOLD.
Solicitor General.

WILL WILSON,
Assistant Attorney General.

JEROME M. FEIT,
Assistant to the Solicitor General.

PHILIP R. MONAHAN,
Attorney.

APRIL 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971